

**Do You Like to
Cross-Examine?**



"A Few Good Men" (December 1992) Columbia Pictures; Castle Rock Entertainment

The truth is,
this doesn't happen.



When does your cross begin?

After the Defense's direct examination, when you are recognized by the court?

During Direct examination?

During Opening?

When you interview a witness?

When you meet your victim?

When you get the file?

When you view the scene?

When the "alleged" crime is "allegedly" committed?

When the witness was born?

13th Chapter of Daniel

Earliest recorded motion to sequester witnesses.



13th Chapter of Daniel

Earliest recorded motion to sequester witnesses.

As she was being led to execution, God stirred up the holy spirit of a young boy named Daniel, 46 and he cried aloud: "I am innocent of this woman's blood."

But he replied, "Separate these two far from one another, and I will examine them." Now, then, if you were a witness, tell me under what tree you saw them together."

55"Under a mastic tree,"* he answered. "Your fine lie has cost you your head," said Daniel; "for the angel of God has already received the sentence from God and shall split you in two."

Now, then, tell me under what tree you surprised them together."

59"Under an oak," he said. "Your fine lie has cost you also your head," said Daniel; "for the angel of God waits with a sword to cut you in two so as to destroy you both."

They rose up against the two old men, for by their own words Daniel had convicted them of bearing false witness. They condemned them to the fate they had planned for their neighbor:

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in accordance with the law of Moses they put them to death. Thus was innocent blood spared that day.



"A Few Good Men" (December 1992) Columbia Pictures; Castle Rock Entertainment

View The Scene

Take Notes

Officer Jenkins

12 years
RHPD

patrol - narcotics

Went to serve SW
Not 1st in house

Heard noise in back
room

where
Co-Aford!

Weapons drawn.

Secured scene.

Brought A: Co-A to
front room

Didn't read Miranda

why

Began search

W searched back Bedroom

Found MJ in a box
in closet

Near?
noise?

Bug seal / Field tested

Dividing line

Trial Notes on Left

Items for cross on Right.

Circle = items
for closing.

Primacy and Recency

Primacy – psychology teaches us that the first words a listener hears will be the words that the listener remembers.

It reaffirms the commonsense belief that first impressions are the most important.

Recency – psychology also tells us that there is an equally compelling concept that the last words a listener hears will also be long remembered and has the greatest impact.

We all instinctively want the last word in an argument.

Application of Primacy and recency and cross-examination

1) Sentence structure

2) Structure of individual chapters

3) Structure, organization and content of the
entire cross-examination

Sentence Structure

How do we ask a proper cross-examination questions?

Short declaratory statement followed by. . .

One fact per question

Terence McCarthy

you tell the story and you testify

Get rid of the repetitious prefixes or taglines

Examples:

Isn't it true?

Is it true that?

Isn't that right?

Is this a fact?

Isn't that correct?

Didn't you?

Let me ask you a question?

If these taglines are at the beginning or the end of the sentence it can destroy primacy or recency.

The repetition of taglines is at best useless, and at worst mind-numbing listener/jury.

Example of primacy and recency wasted

Assault case/bar fight/with this 18 years old witness drinking underage.

Primacy wasted

Isn't it true you are 18?

Isn't it true you went to the bar?

Isn't it true you were drinking?

Isn't it true you were drinking liquor?

Isn't it true you were drinking tequila shots?

Recency wasted

You are 18 years old isn't that right?

You went to the bar isn't that right?

You were drinking isn't that right?

You drinking tequila isn't that right?

Primacy and Recency Utilized

Clean, Crisp, and Clear

You are 18 years old?

You went to the bar?

You were drinking?

Liquor?

It was tequila?

Individual Chapter Construction for Primacy and Recency

Each chapter has to have a purpose

What is the purpose of this chapter?

What is the goal of this chapter?

What do I want the jury to know or learn from this chapter?

Not every chapter has enormous importance.

Use chapters to build on another concept or point.

Example: armed robbery case

Defense is misidentification

Chapter: The Arrival

You were dispatched at 10:15?

You were responding to an armed robbery?

That occurred on Cherry Road?

At the mini mart?

You arrived at 10:30?

You were the first to arrive?

You were the first police of from your department to arrive at the scene?

Chapter: Meeting Ms. Henderson

You got out the car?

You walk towards the entrance of the minimart?

Miss Henderson ran towards you?

In the parking lot?

Ms. Henderson was the clerk?

From the minimart?

Who was robbed that night?

You began to ask her questions?

Example: Burglary Case Where There Is No Forensic Evidence

Chapter: no forensic evidence to connect client to the scene.

Ofc. there are no fingerprints that connect my client to 1529 Bank St.?

There are no footwear impressions that connect my client 1529 Bank St.?

Through is no DNA evidence that connects my client to 1529 Bank St.?

There is not one shred of forensic evidence that connects my client to 1529 Bank St.?

Recency – (End in a powerful Way)

Looping

Looping is a method in which an important or favorable fact is reemphasized by repeating the information in the body of another sentence.

Creating a Loop

Take a leading question and establish a desired fact or phrase.

Use the fact or phrase that established within the body of a succeeding question.

Connect the fact or phrase with the next question that contains an undisputed fact.

Example of a simple loop

The man was hit in the face?

After he was hit in the face he fell to the pavement?

Another example of a simple loop

He was tall?

You had to look up at him?

He was taller than you?

You are 5 foot 11?

You thought of him as a very tall man?

The very tall man was wearing a blue Jean jacket?

Double Loop

Establish first significant fact

Establish second significant fact

Loop both facts in a subsequent question

Example of a Double Loop

Eddie is 6 foot one?

George is 5 foot seven?

You saw the 6 foot 1 Eddie hit the 5 foot seven George?

6 foot one Eddie beat on the 5 foot seven George with his fists?

Example of Single Loop and Double Loop

Example in a snitch case:

When you said, “I didn't do it” to the police, you lied?

You lied because the lie was better than the truth?

You lied because the lie was more likely to help you than the truth?

You lied because you hope the lie would get you out of trouble?

Example double Loop

Example in a snitch case:

And when you lied to get out of trouble you made up details?

And when you lied
To get out of trouble, you made up events?

And when you lied get out of trouble you made-up conversations?

Trilogies

Trilogies are used to build drama and to make for a more memorable presentation whether they are for cross-examination opening argument closing argument

Court rooms of the 19 century and early part of the 20 century where forms of entertainment for citizens

Trilogies have a rhythm, cadence, and phrasing that makes them memorable

Cancer can take away all my physical abilities

It cannot touch my mind,

It cannot touch my heart,

It cannot touch my soul.

Jim Valvano

March 3, 1993



Self-defense case without trilogy

You are 6 foot one?

You are 210 pounds?

My client is smaller than you?

You could tell my client was drunk?

You knew my client was a juvenile?

In spite of this you hit my client?

With a Trilogy

My client is smaller than you, but you hit him anyway?

He was drunk, but you hit him anyway?

He was a kid, but you hit him anyway?

Example: crossing crime scene unit officers

You are responsible for collecting evidence?

You're responsible for collecting evidence, but you chose not to take fingerprints?

You're responsible for collecting evidence, but you chose not to take footwear impressions?

You're responsible for collecting evidence, but you chose not to collect evidence for DNA testing?

You chose not to do a lot of important things in the case?

The Runaway Witness



“Real Time with Bill Maher ” (October 6, 2014) HBO Entertainment

Cross Examination is NOT a fair fight.

You get to ask all the questions.

You get to control the pace.

You should always win.

Techniques That Don't Work

TV, movies, some trial advocacy programs suggest:

“Just answer my question yes or no.”

Judges will not permit it.

Juries think the examiner is not playing fair/lawyer trick or putting words in the witnesses mouth.

Lawyers credibility is lost.

Asking The Judge For Help

“I will permit the witness to give a full and complete explanation if the witness thinks that the explanation is necessary for a complete answer”

“You asked the question counselor and let him answer”

“I think the witness is answering the question”

The Deal

Examiner suggests that she “will only ask fair questions that only require a yes or no answer”

This sends the wrong message to the jury

Lawyer trying to confine the witnesses answers

Lawyer attempting to cut off the witness

This technique is likely to draw objection

Stuff that works.

Nonverbal Techniques

Keep Eye Contact

Always keep your eyes on the witness.

Avoiding eye contact is a sign of weakness.

By having your eyes fixed on the witness it is a nonverbal communication that you will not put up with his or her nonsense.



"Tombstone" (December 1994) Hollywood Pictures; Buena Vista Pictures

Techniques

Ask, Repeat, Repeat

Q: The car was blue

A: Blah, blah, blah

Q: The car was blue (slower)

A: Blah, blah, blah

Q: The car was blue (still slower)

Ask, Repeat, Reverse

Q: State Exhibit 15 is your statement to the police?

A: Yes

Q: You signed it?

A: Blah, blah

Q: You signed it?

A: Blah, blah

Q: You didn't sign it?

Q: Someone else signed it?

Repeating The Question

(Polite form)

Q: You shot John?

A: Blah, blah, blah

Q: You shot John?

A: Blah, blah, blah

Q: I'm sorry that last question may have confused you, let's
try again

or

Q: Maybe my last question was unclear to you, let's start over

Asking the Court Reporter to Read the Question

Q: You shot John?

A: Blah, blah, blah

Q: Perhaps it would be helpful if the court reporter would read back my last question.

Miss Jones would you read the witness my last question?

Now, will you give us an answer to that question?

Challenging the Witness

(the trilogy)

Did you hear the question?

Did you understand the question?

Will you now answer the question?

The “I can’t remember” witness

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CROSS EXAMINATION

12

AMANDA CRANE BY MR. SMITH

13

Q. Mrs. Crane, let me clarify. That night you didn't

14

identify Mr. Heath. is that right?

What is wrong with my question?

CROSS EXAMINATION

AMANDA CRANE BY MR. SMITH

Q. Mrs. Crane, let me clarify. That night you didn't identify Mr. Heath. is that right?

A. I didn't identify him. No, sir.

Q. When you first came into the building did you have anything in your hands at that point?

A. No, sir.

Q. Okay. And you indicated when you went back to your car that your cell phone was not in your car. Is that where you had left it?

A. Yes, sir.

Q. Did you give a description that night to the police of either of the individuals that you saw?

A. I don't recall.

In my trial notebook

I have the cross for each witness
followed by all their statements

but I usually only begin cross with my
questions.

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State of South Carolina)
City of Rock Hill :
Rock Hill Police Department)

PERSONALLY appears before me: Amanda Crane, who after being duly sworn deposes and says: "My name is: Amanda Crane

Date of birth: 11-22-85

Social Security Number: 249-63-9331

My address is: 2576 Cimmeron Road

Place of Employment: RICO Industries, Lancaster, SC

Home Telephone Number: Work Telephone Number: 803-286-5150

I completed 10 years in school and I can (X) cannot () read and write.

On 6-8-11, at approximately 10:33 pm, I went to give Jared some food at five star customs (his place of employment) because he working late. When I pulled up into the driveway of the business I called Jared's cell phone and he did not answer so I began to gather the food to take it inside and that's when the garage door opened and I saw two black males holding Neil up and walking him to his car. One black male was wearing a black shirt and dark colored pants and the other guy was wearing a white t shirt and jeans (I'm not sure of the color). I was sitting in my car and one of the males walking with Neil said to me "he'll be out in a minute". The male in the black shirt came over to my car and stood next to my cracked window and I could hear the other guy yelling around the corner "just ask her to use her phone" the guy in the black shirt then said to me "you got a phone I can use" I said "mine is dead but my husband has one and he's right inside, I'll be right back". I got out of the car and closed my door (I never heard it shut but I didn't pay it any attention) I walked inside and I saw Jared's paint gun lying on the floor and I yelled out his name. He did not answer so I yelled again and he came walking out of the bathroom with speaker wires in his hands and his face was bleeding. He put his arm around me and he said "they robbed us" and he took me to the bathroom in the front office and pushed me up into the ceiling (after he removed the ceiling tiles) and then he climbed up into the ceiling with me. He fell through and climbed back in and we remained there quietly until we heard Neil's voice (he was calling the police). Jared then jumped down from the ceiling and I stayed there until the police arrived.


SIGNATURE OF PERSON GIVING STATEMENT

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SIGNATURE OF PERSON GIVING STATEMENT

1 Q. Okay. At some point did you give a signed statement,

MR. SMITH looks at witness expectantly, but she doesn't budge?

so MR. SMITH looks down at the statement and begins to hand it to the

WITNESS.

WITNESS doesn't want to touch it.

1 Q. Okay. At some point did you give a signed statement,
2 maybe on June 9th of 201

3 A. Yes, sir.

4 Q. And in there was you
5 wearing a black shirt and
6 was wearing a white t-shirt
7 color"?

8 A. Yes, sir.

9 Q. Okay. Is that the entirety of the descriptions that
10 you've ever given to police?

11 A. Yes, sir.

12 Q. Okay. So never anything about height, skin tone,
13 hairstyle or anything like that?

14 A. No, sir.



"Today" Nov. 17, 2015 [NBC]

Crying witness







"Marge In Chains" in "The Simpsons: The Complete Fourth Season" [DVD] 20thCentury Fox (June 2004)

Always have an exit



TRIALS & LITIGATION

Cross-Examination Gone Bad: Angry Witness Accuses Lawyer of Dealing Drugs

POSTED AUG 21, 2008 12:44 PM CDT

BY [DEBRA CASSENS WEISS](#)



A Michigan defense lawyer's cross-examination of an informant went awry yesterday when the witness became angry and said the lawyer questioning him had sold drugs.

Informant David Maki's outburst came after defense lawyer Tim Barkovic called him a liar and a snitch, the [Detroit Free Press](#) reports. Maki "got angry and said defiantly on the stand that Barkovic had sold drugs, after which the judge dismissed the jury," the story reports.

Barkovic is representing a co-defendant accused of felony murder in a store robbery that left one clerk dead and another injured. Jurors were instructed to ignore the comments by Maki.

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